FRANKLIN INDUSTRIAL MINERALS

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U.S. Dept of Labor HEADQUARTERS
612 TENTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37203
615-259-4222

4 Page Fax - (202) 693-9441

Mine Safety & Health Administration
Office of Standards, Regulations & Variances
1100 Wilson Blvd., Room 2313
Arlington, VA 22209-3939

Dear Adminstrator,

Please consider these written comments concerning the Diesel Particulate Matter Exposure of Underground Metal and Nonmetal Miners, RIN 1219-AB29, Proposed Rule, issued August 14, 2003 in the *Federal Register*/Vol. 68, No. 157.

Franklin Industrial Minerals is a privately owned company that mines produces high-purity, chemical-grade limestone serving more than 20 major industrial and agricultural markets. Limestone is mined at surface and underground operations across the southern United States. We take pride in providing a safe environment for our team members to work. We usually don't get involved in this type of regulatory issue because we believe MSHA regulations help us protect our team members; however we felt compelled to address the issue of diesel particulate matter exposure to underground miners.

Summary

We believe there is insufficient exposure-response information to justify establishment of occupational exposure limits for DPM at this time. We oppose the final permissible exposure limit (PEL), because of the dearth of exposure-response data and because we believe the final PEL is neither technologically nor economically feasible. We support rotation of workers as a viable administrative control option, and oppose any attempt to impose further record-keeping burdens on an industry already buried in regulatory paper.

The Final DPM Rulemaking Was Arbitrary and Capricious

The current rulemaking is the latest evolution of rules that have their genesis in the final DPM rule issued on January 19, 2001, the last day of the previous Administration. That rulemaking was arbitrary and capricious for many reasons.

First, the health effects/risk characterization sections of this document were not independently peer-reviewed. For a regulation that imposes the economic burden on an industry that this one does, failure to submit this work product for validation by credible independent resources is inexcusable and must be rejected for that reason alone. Besides failing to peer review its 2001 risk assessment in support of the rule, we see no evidence that MSHA subjected to peer review the seven so-called Haney industrial hygiene

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studies. We support the numerous comments made about these reports that were submitted for the record by the MARG Coalition on July 31, 2000, and support a motion made by the National Mining Association to have these documents stricken from the record. We would also like to state that we support the comments made throughout this lengthy rulemaking by Drs. Borak, Cohen and Valberg, as well as comments of IMC Global, regarding MSHA's risk assessments.

The Agency's arbitrary and capricious behavior is also exemplified by its cavalier dismissal of industry complaints at the time of the 2001 rule that the submicron impactor was not commercially available. According to NIOSH and industry sources, the impactor-cassette assembly was not available for field use before August 2002. If so, that would throw into question all of the results from the 31-mine study, which was done in the fall of 2001, and was used by MSHA as justification for its recommended sampling methodology, use of elemental carbon as a surrogate, and for the EC/TC ratio that forms the basis of the current rulemaking.

MSHA's arbitrary and capricious rush to rulemaking does not stop here. While commenting that it would accept any control, or combination thereof, aside from worker rotation and, initially, personal protective equipment, to meet the PELs in the standard, the Agency repeatedly issued pronouncements favoring exhaust filtration devices. We are particularly troubled by this recommendation, and see filtration as the choice of last resort because of the problems, practicality and costs associated with them. MSHA failed to mention that some platinum-based filters are capable of producing levels of nitrogen dioxide (NO_2) above MSHA's regulatory limit. The result was that some well-meaning mine operators, following MSHA's advice, unwittingly exposed their miners to elevated levels of this air pollutant, forcing immediate evacuation of the affected area of the mine until levels were brought under control. Once the horse was out of the barn, the Agency issued a Program Information Bulletin on the problem in May 31, 2002. The literature will show that this problem was known for some time before MSHA publicly acknowledged it.

We also firmly believe that MSHA's economic analysis grossly underestimates the feasibility of this rule and that it is based on a seriously flawed instrument, MSHA's Estimator®. MSHA predicated its entire technical and economic feasibility analysis on the use of this computerized spreadsheet program that assumes perfect air mixing and the existence of effective ventilation for dilution of exhaust particulate. Because the instrument itself is flawed, MSHA's feasibility conclusions must be considered invalid and therefore must be withdrawn.

MSHA must keep in mind that mines are set up to sell ore and to make a profit doing so; they do not exist to perform mini-research projects to determine if filters are going to work on every piece of equipment MSHA believes might need them. Stone operators have been committed to meeting MSHA's unjustified interim PEL. Still, judging by the results of MSHA's recently completed baseline studies, a significant portion are having trouble doing so, as 16.2% of the stone samples were out of compliance with the interim limit. Clearly, many more will be unable to comply with the final PEL.

MSHA has built a regulatory record on DPM based on nonpeer-reviewed research and analysis, in disregard of its statutory requirements under the Mine Act, on the basis of inherently flawed instruments, and in a manner that has subjected miners to other health risks and operators to unnecessary costs, all apparently in a mad rush to get a rule out the door during a politically favorable regulatory climate. The new Administration at MSHA can rightfully exclaim "Not Guilty." But it will assume the sins of its

predecessor if it allows rulemaking on the final PEL to move forward. We urge the Agency in the strongest possible terms to drop the final PEL and to do so in this rulemaking.

Specific Responses to Provisions in the Proposed Rule

We incorporate by reference comments submitted by the National Stone, Sand & Gravel Association (NSSGA) to MSHA on Nov. 25, 2002 in response to MSHA's Advance Notice of Proposed Rulemaking (ANPRM).

We agree with the proposed changes to Sec. 57.5060, Limit on concentration of diesel particulate matter, including consideration of economic feasibility. However, we recommend an appeals provision be added for operators whose requests for extension are turned down by the District Manager. A specific maximum time frame of 30 days be incorporated for the District Manager's review. Another 60 days be allowed to file an appeal, and for the appeal to be heard.

We oppose the rejection of any application for an extension based on a finding by MSHA that the operator had failed to evaluate filter technology. Practical mine-worthy filter technology is not yet available to the industry. We reject MSHA's reasoning that would dispute an operator's assertion of technical infeasibility after that operator demonstrates a vehicle is unsuitable for passive regeneration of a filter because of limitations of its duty cycle. Contrary to MSHA's view, we believe infeasibility is indeed proven at the point when, as MSHA puts it, "a certain amount of applications engineering might be required to produce a workable or optimal system."

We oppose the ban on worker rotation, and, as already stated, reject the final PEL. Independent research performed for the MARG Coalition led to that group's recommendation of a 320 $_{EC}ug/m^3$ equivalent to the 400 $_{TC}ug/m^3$, not 308 $_{E}ug/m^3$, the limit in the proposed rule. MSHA, however, rejected that number; we are concerned, therefore, that the MSHA conversion will permit unfounded enforcement actions.

We do not subscribe to MSHA's proposal that a 25% or greater reduction in DPM exposure from an engineering or administrative control is significant, and thereby effective for its decision-making on technological or economic feasibility. Controls should be evaluated independently and in reference to site-specific conditions and DPM levels if meaningful decisions on significance or effectiveness are to be made. The goal is to reduce the exposure below the PEL benchmark, not achieve a reduction based on a percentage benchmark. If a DPM result is 10% over the benchmark and a reduction puts it 5% under, how can MSHA not consider that a significant reduction? Respirator requirements should conform to existing MSHA requirements. We do not support a transfer provision.

Regarding Section 5061, Compliance determinations, we oppose enforcement of occupational health standards based on a single sample because standards are based on long-term exposure, and laboratory results of single samples are not an accurate representation of a single shift exposure. The practice of taking action on the basis of a single sample result also does not represent standard industrial hygiene practice. We continue to be concerned that MSHA's newly developed and revised DPM sampling and analysis "single shift" sample analysis system is not feasible and does not provide accurate, precise, and reliable results. MSHA should retain unused DPM filter sections for analysis by mine operators.

Through NSSGA, our trade association we have previously voiced opposition to Sec. 5062, the DPM control plan, as we believe it is a disproportionately extreme response to a single sample exceedance, especially considering our reservations about MSHA's single-sample enforcement practice.

We also view this provision as an unnecessary paperwork exercise, which could put it in conflict with the Paperwork Reduction Act, and most certainly with Presidential intent as set forth in the Small Business Paperwork Relief Act of 2002. PL 107-198 makes paperwork reduction a serious, ongoing effort; to that end, MSHA should be trying to find ways to reduce the burden on small business, not add to it.

The requirements of Sec. 57.5075, Diesel particulate records, tell us the rule carries too heavy a paperwork burden. We have already voiced opposition to the control plan, and here express our disapproval of any unique maintenance log and mechanic competency paperwork requirements. The tagging requirement that triggers the log is itself a paperwork requirement not mentioned as such by the Agency. We support operator documentation of a maintenance log as a good maintenance practice, but not any change in an operator's current forms or procedures for documenting maintenance activities. In other words, insofar as MSHA's maintenance log requirement might mean an operator will have to create a unique form beyond that already used to document maintenance, we oppose the requirement.

We also oppose the mechanic certification requirement. An operator has a market-based incentive far stronger than an MSHA citation for employing good mechanics; the very reason for existence of the business – to mine ore for sale at profit – is at stake. An incompetent or ill-trained mechanic could put that objective at risk. Most mobile dieselized equipment is very expensive; few operators would put the care of such equipment in the hands of inexperienced personnel.

Other Comments

We also request that MSHA consider the comments submitted on this rulemaking by NSSGA and the MARG Coalition.

Thank you for the opportunity to share our views on this important regulatory activity.

Respectfully,

Jim Ruddell
Director of Environment and Safety
Franklin Industrial Minerals